IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17/09/2002

Coram

The Hon'ble Mr. Justice P. SATHASIVAM

Application No. 177 of 2001

in INSOLVENCY NOTICE. 39 of 2001

T.T.V. Dhinakaran ..... Applicant.

-Vs-

Dy. Director,
Enforcement Directorate,
Shastri Bhawan, Chennai-34. ..... Respondent.

!For applicant: Mr. B. Kumar, Senior Advocate
For M/s. A. Jenasenan and R. Loganathan.

For respondent: Mr. V.T. Gopalan, Addl.Solicitor
General for Mr. R. Viduthalai, Senior Central
Government Standing counsel.

:ORDER

Aggrieved by the Insolvency Notice 39 of 2001 issued under Section 9(2) of the Presidency Towns Insolvency Act (III of 19 09), T.T.V. Dhinakaran, applicant herein, has filed Application No. 1 77 of 2001 to set aside the said Notice.

2. Enforcement Directorate (Foreign Exchange Regulation Act - now FEMA) through its Deputy Director, Shastri Bhavan, Chennai-6 - petitioning creditor has filed Insolvency Notice No. 39 of 2001 before this Court for issuance of Insolvency Notice to T.T.V. Dhinakaran, Chennai-20 under Section 9 (2) of the Presidency Towns Insoslvency Act and Form No.14A of the Insolvency Rules. In the affidavit filed in support of the above Notice, the Deputy Director of the petitioning creditor has stated that it has obtained an order in F.No. T.3/2 2-D/95 (32) on the file of the Special Director, Enforcement Directorate (Foreign Exchange Regulation Act - now FEMA) at New Delhi on 6-2-98, for a sum of Rs.31 Crores, towards payment of penalties, which was subsequently modified to a sum of Rs.28 Crores by the order dated 5 -5-2000 in Appeal No. 51 of 1998, on the file of the Foreign Exchange Regulation Appellate Board, New Delhi. Against the aforesaid order of the FERA Board, the debtor herein

preferred C.M.A.No. 914 of 2000 on the file of this Court. The stay application filed in C.M.P.No. 8 587 of 2000 along with the said C.M.A. was argued at length and ultimately the Division Bench of this Court indicated that the orders of the FERA Board could be stayed, on the debtor herein depositing 50 per cent of the amount due and furnishing a bank guarantee for the balance. At this stage, the stay petition was withdrawn by him and the same was dismissed as withdrawn by order dated 28-7-2000. Therefore, as on date, there is no stay of the aforesaid order of FERA Board which has become due and payable by the debtor herein. The debtor has not paid any amount towards the due till now. In such a circumstance, the Enforcement Directorate has prayed for issuance of Insolvency Notice to the debtor-T.T.V. Dhinakaran under Section 9(2) of the Presidency Towns Insolvency Act and Form No.14A of the Insolvency Rules.

3. Pursuant to the order of the Master dated 01-03-2001 , Notice was issued on 02-03-2001 to the debtor. Questioning the said Insolvency Notice, the applicant-T.T.V. Dhinakaran has filed the above application praying for an order to set aside the said Notice for adjudicating him as an insolvent under Section 9(2) of the said Act.

4. In the affidavit filed in support of the said application i.e., A.No. 177 of 2002, the applicant has stated that the petition filed invoking the provisions of Insolvency Act by the Enforcement Directorate is a serious abuse and a misuse of the power, as the factors enumerated in the affidavit would show that the said petition filed by the Enforcement Directorate to adjudicate him as an insolvent is a wanton misuse of power. The allegation that he is an insolvent and liable to be declared so is prima facie defamatory. The object of any insolvency petition ought only to be distribution of the estate of the insolvent amongst the creditors. The application filed by the respondent does not even mention the barest requirement of the act; hence it is liable to be dismissed in limine. The Special Director of Enforcement Directorate under FERA issued a memorandum of show cause notice under Section 50 of the FERA. In the said notice, he has alleged that the petitioner was a Director of the company registered under the Companies Act of British Virgin Island. Qua a Director of the said company, he had received certain drafts which instrument were in the name of the company viz. Dipper Investments when the petitioner was out of India. He had sent the drafts for collection to the accounts maintained by the said company in England. It is on this Show Cause Notice was issued stating that the petitioner had acquired the foreign exchange and therefore he had committed a violation of Section 8(1) and 9(1)(d) of the FERA Act. Against the said order, an appeal was filed, but the same had been dismissed. The petitioner has filed further statutory appeal before this Court. A Division Bench of this Court has admitted the appeal in C.M.A.No. 51/2000 and the same is pending. The application issuing notice of insolvency is totally misconceived, absolutely without basis, motivated to disgrace the petitioner and to humiliate him. At all times the petitioner acted only as a Director. The drafts are all drawn in the name of Dipper Investments. Therefore, the petitioner had acted only as an agent of the company, the Director being an Agent of the company. Therefore, the application to declare

the petitioner as an insolvent is an abuse of the power. The Enforcement Officer is not a creditor within the meaning of the Presidency Towns Insolvency Act. Further, the petitioner herein is a Deputy Director, Enforcement Directorate, Chennai. He is not the person to whom any money is payable under the order of adjudication. For contravention of violations or offence under the FERA a penalty is imposable. It is an extortion of law for violation of an enactment of a penal nature. The penalty is payable only to the Government. It is the Central Government that would claim any amount that is imposed as a penalty. Therefore, the Enforcement Officer is not a person to whom any amount is due from the petitioner. The present application filed by the Enforcement Officer is wholly not maintainable, as he cannot be considered as a creditor within the meaning of the Insolvency Act.

5. It is further stated that the amount claimed as due from the applicant is not and could not be within the concept of debt within the meaning of the Insolvency Act. The debt that is contemplated under the Insolvency Act having regard to the scope and object of Insolvency Legislation, is only a contractual obligation that would give rise to a civil liability of a debt for a breach of contract or damages arising on account of breach of contract. The explanation added to Section 9 makes the position clear. The penalty under Section 50 is not a debt arising out of any contract, so as to envisage an application of Insolvency Act. FERA is a self-contained Code and a special law containing provisions for investigation of offence under the Act, enquiry, search and seizure and imposition of penalty as well as for imposition of punishment for offence under the Act. FERA is a self-contained comprehensive Code by its scope and constitutes a special law prescribing a special form of procedure for imposition of penalty for committing an offence under the Act. Elaborate produce has been provided for recovery of the penalty. Therefore, the different mode of recovery provided under the FERA would completely and totally exclude the application of the Insolvency Act. Apart from the inapplicability of the Insolvency provisions for recovery of a penalty imposed for violation of an offence, the petitioner department had already elected to pursue the remedy under FERA and a prosecution is pending and taken cognisance of by the criminal court. Therefore, the Directorate is estopped and barred from pursuing the remedy under the Insolvency Act. Further, when a statutory appeal under Section 9 (2) of the Act is entertained by this Court and pending, the order of the appellate authority would no longer be enforceable within the meaning of Section 9 (2) of the Act. The petitioner department had not even mentioned the properties of the debtor to be administered in the insolvency. The petitioner is a Member of Parliament and he belongs to a party which is opposed to the party ruling the Central Government. In order to humiliate, disgrace and disqualify him, the Directorate has filed this application. An adjudication under the Insolvency Act is designed to bring about a change in the status of a debtor and to enable an Official Assignee or receiver to equally distribute the property of an insolvent among the creditors. Inasmuch as the petitioner is facing criminal prosecution on the same set of facts, the present proceedings under the Insolvency Act is not maintainable, and the same is liable to be set aside.

6. Heard Mr. B. Kumar, learned senior counsel for the applicant and Mr. V.T. Gopalan, learned Additional Solicitor General for respondent.

7. Mr. B. Kumar, learned senior counsel for the applicant, after taking me through the order of the Special Director, Enforcement Directorate (Foreign Exchange Regulation Act), the Order of the Foreign Exchange Regulation Appellate Board, the pendency of appeal (C.M.A.No. 914 of 2000) before the Division Bench of this Court, the provisions of the Foreign Exchange Regulation Act, 1973 (FERA), the Presidency Towns Insolvency Act, and the Insolvency Rules, 1958, has raised the following contentions:

i) The Notice as issued by the petitioning creditor is liable to be rejected, as the same has not been issued on the orders of this Court and the service as has been made is neither prescribed nor it is under prescribed manner;

ii) The pre-condition for issuance of notice under Section 9 (2) of the Presidency Towns Insolvency Act is not satisfied and the impugned Notice under Section 9 (2) is premature;

iii) The penalty imposed under FERA could never be one that is contemplated under Section 9(2) of the Presidency Towns Insolvency Act;

iv) FERA is a complete Code and the issuance of Notice under Section 9 (2) of the Presidency Towns Insolvency Act cannot be sustained;

v) The Deputy Director (Enforcement Directorate) has no competency to represent Enforcement Directgorate;

vi) The insolvency proceedings have to be construed with greatest strictness in favour of the debtor.

8. Mr. V.T. Gopalan, learned Additional Solicitor General for the respondent-Directorate, has raised the following submissions:

i) In view of Statement of Objects and Reasons for introducing Section 9 (2) to (5) of the Insolvency Laws (Amendment) Act 1978, the amounts due under the orders of the FERA Appellate Board can also be enforced by resorting to insolvency proceedings by giving notice to the concerned debtor;

ii) Mere pendency of an appeal does not take away the finality that would attach to a decree and that the finality of the decree is only with reference to executability and not as to whether any appeal is pending or not;

iii) A debt arises not merely out of a contract between the parties or out of a civil decree enforceable by execution so as to attract the provisions of the Insolvency Act;

(iv) Sub-section (3) of Section 70 of FERA authorises the Government to proceed under any other law notwithstanding the specific provisions contained in FERA.

(v) The applicant cannot raise additional defence other than those specified in Section 9(5); and

(vi) The quasi judicial adjudicating authority namely Enforcement Directorate can very well file an appeal or proceedings including the insolvency proceedings to recover the debt payable to them.

9. I have carefully considered the rival submissions.

10. Before considering the above contentions, it would be useful to refer the materials furnished in the affidavit filed in Insolvency Notice No.39 of 2001. One S. Subramanian, Deputy Director of the petitioning creditor (Enforcement Direcotorate) has sworn to an affidavit. The details furnished in the said Insolvency Notice are as follows:

"2. The Petitioning Creditor has obtained an order in F.No. T.3/22-D/95(32), on the file of the Special Director, Enforcement Directorate (Foreign Exchange Regulation Act - now FEMA) at New Delhi, on 6-2-1998, for a sum of Rs.31 Crores, towards payment of penalties, which was subsequently modified to a sum of Rs.28 Crores by the order dt. 5-5-2000 in Appeal No. 51 of 1998, on the file of the Foreign Exchange Regulation Appellate Board, New Delhi. Against the aforesaid order of the FERA Board, the debtor herein preferred CMA No. 91 4 of 2000 on the file of the Hon'ble High Court, Chennai. The stay application filed in C.M.P.No. 8587 of 2000 along with the said C.M.A. was argued at length and ultimately their Lordships were pleased to indicate that the aforesaid orders of the FERA Board could be stayed, on the debtor herein depositing 50% of the am ount due and furnishing a bank guarantee for the balance. At this point the CMP for stay was withdrawn by the debtor herein and the same was dismissed as withdrawn by order dt. 28-7-2000. Therefore, as on date, there is no stay of the aforesaid order of the FERA Board, modifying the penalty amount to Rs.28 Crores, which has become due and payable by the debtor herein. As such there can be no impediment whatsoever for having the said amount of penalty realized from the debtor herein and the debtor has not paid any amount towards the due till now.

3. In the circumstances, mere pendency of the above said CMA will not destroy the finality of the aforesaid order of the Appellate Board modifying the order of the Special Director, Enforcement Directorate."

Before going into the merits of the Insolvency Notice, at the foremost I shall consider the first contention raised by Mr. B. Kumar, learned senior counsel for applicant namely that the Insolvency Notice had not been issued on the orders of the Insolvency Court and the same is not in the prescribed form. The Insolvency Notice 39 of 2001 had been issued on 2-3-2001 on the orders of the Master of this Court dated 1-3-2001. A perusal of the said notice shows that the same is issued under Section 9 (2) of the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as "the PTI Act") and Order VIII, Rule 1 (21) of the Insolvency Rules, 1958. The format and procedure adopted are in order. Though it is contended that the matters relating to Section 9 (2) is not one of them as specified under Section 6 (2) of the Act delegating the power by the Chief Justice of the High Court, after verifying the notification of the Chief Justice empowering the Master to issue Notice under Section 9 (2), the learned senior counsel for the applicant has not seriously pressed the said contention. On verification, I am satisfied that the Insolvency

Notice is in terms of the format provided under the Rules and the Master of this Court is fully empowered to issue Insolvency notice under section 9 (2); accordingly I reject the first contention raised by the learned senior counsel for the applicant.

11. After considering the rival contentions, the following legal questions arise for consideration by this Court.

a) Whether the order imposing the penalty had become final within the meaning of Section 9 (2) of the PTI Act in view of pendency of C.M.A.No. 914 of 2000 before the Division Bench of this Court;

b) Whether the order of levy of penalty and its realisation could be said to be outside the purview of the PTI Act and whether the same can be regarded as debt within the meaning of the Act;

c) Whether Section 9 (2) of the PTI Act contemplates only a decree passed on a contract or the transactions involving mutuality?

d) Whether the FERA is a complete Code and as such in respect of the liability thereon, the provisions of the insolvency could not be resorted to?

e) Whether any other defence apart from the three provided under Section 9 (5) of the PTI Act is available to the applicantdebtor?

f) Whether the Enforcement Directorate is an independent entity and whether the proceedings initiated by the Deputy Director cannot be said to be by the Government of India?

12. Before considering the above legal aspects in seriatim, it is to be noted that the Enforcement Directorate - petitioning creditor has obtained an order on 6-2-98 on the file of the Special Director, Enforcement Directorate (Foreign Exchange Regulation Act), New Delhi for a sum of Rs.31 Crores towards payment of penalties. On appeal by the debtor herein, the same was modified to a sum of Rs.28 Crores by order dated 5-5-2000 in Appeal No.51/1998 on the file of the Foreign Exchange Regulation Appellate Board, New Delhi. Against the said order of FERA Board, the debtor herein preferred C.M.A.No.914/2000 before this Court under Section 54 of the FERA. There is no dispute that only on questions of law the appeal shall be entertained by this Court against any decision or order of the appellate Board. Here I have already referred to the fact that C.M.A.No.914/2000 preferred by the debtor has been entertained by the Division Bench of this Court and the same is pending. No doubt, though the debtor has filed a stay petition seeking stay of the order of the FERA Board, ultimately the said petition was dismissed as withdrawn by order dated 28 -7-2000. After the dismissal of the stay petition, the Enforcement Directorate has resorted to the insolvency proceedings by issuing the impugned Insolvency Notice 39 of 2001.

13. Now I shall consider the relevant provisions which we are concerned from the Presidency Towns Insolvency Act, 1909.

"Section 2. Definitions.-In this Act, unless there is anything repugnant in the subject or context,-

(a) "creditor" includes a decree-holder;
(b) "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor;"

Part II Section 9 (1) provides acts of insolvency. The impugned insolvency notice has been issued under sub-section (2) of Section 9. Sub-sections (2) to (5) were inserted by the Insolvency Laws ( Amendment) Act 1978 (Act 28/78) which came into force with effect from 1.8.79. Among those sub-sections, sub-sections (2) and (5) are relevant for our purpose:

Section 9 (2).- Without prejudice to the provisions of sub-section (1), a debtor commits an act of insolvency if a creditor, who has obtained a decree or order against him for the payment of money (being a decree or order which has become final and the execution whereof has not been stayed), has served on him a notice (hereafter in this section referred to as the insolvency notice) as provided in sub-section (3) and the debtor does not comply with that notice within the period specified therein:
Provided that where a debtor makes an application under subsection (5) of setting aside an insolvency notice-
(a) in a case where such application is allowed by the court, he shall not be deemed to have committed an act of insolvency under this sub-section; and
(b) in a case where such application is rejected by the court, he shall be deemed to have committed an act of insolvency under this sub-section on the date of rejection of the application or the expiry of the period specified in the insolvency notice for its compliance, whichever is later:

Provided further that no insolvency notice shall be served on a debtor residing, whether permanently or temporarily outside India, unless the creditor obtains the leave of the court therefore.
(3)xx xx
(4)xx xx
(5) Any person served with an insolvency notice may, within the period specified therein for its compliance, apply to the Court to set aside the insolvency notice on any of the following grounds, namely:-
(a) that he has a counter-claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that-

(i) he has made an application before the competent authority under such law for the setting aside of the decree or order; or
(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of the application.

Explanation.- For the purpose of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act.
Section 13. Proceedings and order on creditor's petition.- (1) xx xx
(2) xx xx
(4) The Court shall dismiss the petition-

(a) if it is not satisfied with the proof of the facts referred to in sub-section (2); or

(b) if the debtor appears and satisfies the Court that he is able to pay his debts, or that he has not committed an act of insolvency or that for other sufficient cause no order ought to be made."

Mr. V.T. Gopalan, learned Additional Solicitor General appearing for the Enforcement Directorate, very much emphasized the Statement of Objects and Reasons for introducing sub-sections (2) to (5) of Section 9 by the Amendment Act 28/78. The Statement of Objects and Reasons are as under:

" Amending Act 28 of 1978
1) The difficulties experienced by a litigant in India in executing even a simple money decree have been commented upon by the Privy Council as well as by the Law Commission and Expert Committee on Legal Aid. The Law Commission in its Third Report on the Limitation Act, 1908 has recommended that the most effective way of instilling a healthy fear in the mind of dishonest judgement-debtor would be to enable the Court to adjudicate him an insolvent if he does not pay the decretal amount after notice by the decree holder by specifying a period within which it should be paid on the lines of the amendment made to the Presidency Towns Insolvency Act, 1909 in Bombay. This recommendation was reiterated by the Law Commission in its Twenty Sixth Report on Insolvency Laws.

ii) The Expert Committee on Legal Aid was also of the view that the above recommendation of the Law Commission should be implemented immediately without waiting for the enactment of a comprehensive law of insolvency.

iii) It is therefore proposed to amend the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act 1920 to add a new act of insolvency namely that a debtor has not complied with the insolvency notice served on him by a creditor who has obtained a decree or order against him for the payment of money within the period specified in the notice. If the amount shown in the insolvency notice is not correct it would be invalidated if the debtor gives notice to the creditor disputing the amount. The debtor can however apply to the Court to have the insolvency notice set aside on the ground among others that he is entitled to have the decree re-opened under any law relating to relief of debtedness or that the decree is not executable under any such law.

iv) The Bill seeks to achieve the above objects. (Gazette of India dated

18-3-1978 pt.II,S.2 Ext.p.188.)"

By emphasizing the Statement of Objects and Reasons in introducing sub-sections (2) to (5) of Section 9, it is argued that the amounts due under the orders of FERA Appellate Board can also be enforced by resorting to insolvency proceedings giving notice to the concerned debtor and in the event of the concerned debtor not replying to the said notice within the time or having replied and his reply has been rejected by the Court, an act of Insolvency should be deemed to have taken place. It is also contended that thereafter further proceedings to adjudicate the debtor as insolvent may have to be taken by following further procedure from Section 10 onwards. Though the learned Additional Solicitor General has very much emphasized the Statement of Objects and Reasons for introducing the amendment namely insertion of Section 9 (2) to (5), Mr. B. Kumar, learned senior counsel for the debtor, by pointing out a decision of the Constitution Bench of the Supreme Court in Aswini Kumar v. Arabinda Bose, reported in A.I.R. 1952 Supreme Court 369, would contend that the Statement of Objects and Reasons appended to the Bill should be ruled out as an aid to the construction of a statute. The relevant portion in the decision is extracted hereunder: (para 32)

"32. As regards the propriety of the reference to the Statement of objects and reasons, it must be remembered that it seeks only to explain what reasons induced the mover to introduce the bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. We, therefore, consider that the Statement of objects and reasons appended to the Bill should be ruled out as an aid to the construction of a statute."

In the light of the reasoning of the Constitution Bench, we need not give importance to the Statement of objects and reasons appended to the Bill relied on by the learned Additional Solicitor General for the Enforcement Directorate. Accordingly, the argument that the Statement of objects and reasons make it clear that Section 9 (2) of the Act was meant to terror raise the decree holder to pay the amount due to the decree or suffer an order of insolvency are totally misconceived. In this regard, it is relevant to ref er the objective of insolvency. In Halbury's Laws of England in para 201 it is stated that,

"201. Meaning of "bankruptcy". Bankruptcy is a proceeding by which possession of the property of a debtor is taken for the benefit of his creditors generally, by an officer appointed for the purpose, the property being realised and, subject to certain priorities, distributed rateably amongst those creditors, that is to say, the persons to whom the debtor owes money or has incurred pecuniary liabilities?.

When a man becomes bankrupt, he becomes subject to certain disqualifications in respect of his civil rights and public offices. Although no longer looked upon as a crime, as it once was, bankruptcy involves a change of status, and carries with it quasi-penal consequences, rendering the bankrupt liable to prosecution for specific bankruptcy offences."

The object of the law of bankruptcy as found in Halbury's Bankrupt Law-3rd edition, page 1, is "The chief aim of every system of Bankrupt Law should be to combine and regulate two great objects: First, the distribution of the effects of the debtor in the most expeditious, the most equal, and the most economical mode; and secondly, the liberation of his person from the demands of his creditors when he has made a full surrender of his property. The above observations should not be lost sight while construing "debt", "debtor" as provided in the P. T.I. Act. (Emphasis supplied)

14. With reference to sub-clause (2), Mr. B. Kumar, learned senior counsel for the applicant, contended that in view of the pendency of the appeal entertained by the Division Bench on being satisfied that questions of law arise for consideration, which has not become final, no notice under section 9 (2) can be resorted to. He has further contended that the decree or order which has not become final that is contemplated under the section is only a decree order which is capable of execution in a Civil Court which execution has not been stayed. According to the learned senior counsel for the applicant, in the light of pendency of the appeal, having been entertained on questions of law, the order of the FERA Appellate Board is not executable. It is also contended that there has never been any case or instance that an order or decree which is not executable in a Civil Court can be a subject matter of a notice under section 9 (2). There is no dispute that the orders passed by the Special Director on 6-2-98 is passed one under Section 51 of the FERA. Section 51 says that where any person has committed the contravention of any provision of the FERA, rule or order, the Adjudicating Authority can hold an enquiry after giving reasonable opportunity for making representation in the matter. On being satisfied that the person has committed contravention, he may impose penalty as he deems fit. Accordingly, the order passed by the Special Director is imposition of penalty for contravention or violation of the provisions of FERA. By pointing out the orders of the Adjudicating Authority and the FERA Appellate Board, it is contended that what is imposed is by way of penalty and a penalty imposed is not and cannot be a debt. Mr. B. Kumar also contended that the penalty imposed by the competent authority cannot be equated to a debt as provided in the PTI Act.

15. The concept of "penalty" has come up for consideration before the Supreme Court in Shiv Dutt Rai Fateh Chand v. Union of India, reported in AIR 1984 Supreme Court 1194 wherein it is stated that "the word "penalty" is a word of wide significance. Sometimes it means recovery of an amount as a penal measure even in a civil proceeding. An exaction which is not of compensatory character is also termed as a penalty even though it is not being recovered pursuant to an order finding the person concerned guilty of a crime." In Sova Ray v. Gostha Gopal Dey, reported in AIR 1988 Supreme Court 981, it was held that the expression "Penalty" is an elastic term with many different shades of meaning but it always involves an idea of punishment". The penalty imposed in

our case is penal in character. It is not compensatory in nature nor is it contractual. No doubt, as per Section 2 (a), the creditor includes a decree holder; 2 (b), the debt includes judgment debt and debtor includes judgment debtor. Mr. V.T. Gopalan, learned Additional Solicitor General argued that the aforesaid two definitions are not exhaustive and they are only by way of illustration. He also argued that any liability which has ascertained in terms of money will be a debt and can be comprehended within the meaning of the definition "debt". He further argued that the word "includes" in a statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of an extension and not with restriction. According to him, the word "includes" is very generally used in interpretation clause in order to enlarge the meaning of the words in phrases. He very much relied on a decision of the Apex Court in P. Kasilingam v. P.S.G. College of Technology, reported in AIR 1995 S.C 1395. The following passage at page 1400 is pressed into service: (para 19)

"19. The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words ' means and includes', on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

In Regl. Director, ESIC v. High Land Coffee Works, reported in (1991) 3 Supreme Court cases 617, it has been held that the word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of exte nsion, and not with restriction. By pointing out the above decisions, learned Additional Solicitor General for the Revenue would contend that where definitions are not exhaustive of the matters that could be comprehended within the meaning of the word "debt" then any liability quantified in terms of money payable will constitute debt.

16. Mr. V.T. Gopalan, learned Additional Solicitor General relied on a Division Bench decision of this Court in Muthupalaniapa Chettiar v. Alagamai Achi and others, reported in AIR 1961 Madras 438. In para 12 the Division Bench has held that,

"The term "debt" no doubt, is commonly used to describe liabilities which have an origin in contract; but we see no reason why we should restrict the connotation of that term to such liabilities only. Anything due and payable is a debt?"

He also relied on a Division Bench decision of this Court in Commissioner of Wealth Tax v. Pierce Leslie and Company, reported in AIR 1963 Madras 356 wherein Their Lordships have held thus: (para 7 and 11)

"7. Debt is a common expression and it is difficult to believe that it can give rise to any controversy in interpreting it. Broadly stated it is a liquidated money obligation for the recovery of which an action will lie. It is an ascertained liquidated quantified obligation enforceable 'in praesenti'

or 'in futuro'. A debt must be a "debitum" that is due. The fact that the time for payment will arise in future does not make it any the less a debt?.

11?..The essential requisites of a debt are therefore (1 ) an ascertained or readily calculable amount; (2) an absolute unqualified and present liability in regard to that amount with the obligation to pay forthwith or in future within a time certain; (3) the obligation must have accrued and subsisting and should not be that which is merely accruing."

17. The learned Additional Solicitor General has also relied on another decision of the Supreme Court in Kesoram Industries v. Wealth Tax Commissioner (Central) (AIR 1966 Supreme Court 187 0) wherein Their Lordships have held that a debt is a present obligation to pay an ascertainable sum of money, whether the amount is payable in praesenti or in futuro: debitum in praesenti, solvendum in futuro. They have also held that the liability to pay income-tax is a debt within the meaning of Section 2 (m) of the Wealth Tax Act. The sum and substance of the argument of Mr. V.T. Gopalan is that a debt arises not merely out of a contract between the parties or out of a civil decree enforceable by execution so as to attract the provisions of the Insolvency Act. According to him, any ascertained sum of money found to be payable from one person to another is a debt and will be comprehended under Section 2 (b) of the Insolvency Act. I have already referred to the orders of the adjudicating authority imposing penalty of Rs.31 Crores and the order of the Appellate Board reducing the penalty to Rs.28 Crores. In other words, what is provided and imposed under the FERA Act is a penalty and the said penalty imposed cannot be equated to a debt for the purpose of Insolvency Act. I have already referred to the dictum of the Supreme Court in Shiv Dutt Rai Fateh Chand v. Union of India, reported in AIR 1984 S.C.1194; and in Sova Ray v. Gostha Gopal Dey, reported in AIR 1988 S.C. 981 wherein Their Lordships have held that though the expression "penalty" is an elastic term with many different shades of meaning but it always involves an idea of punishment. Thus, the penalty in this case is penal in character and it is not compensatory in nature, nor is it contractual. Such a penalty could never be one that is contemplated under Section 9 (2) of the PTI Act and it could never be equated to a non-payment of a decree debt nor the person not paying the penalty or penalty could be characterised as a debt.

18. Under the Insolvency Act, the decree or order contemplated is the decree or order of a Civil Court, the basis of which is contract and where consideration has been passed from the creditor to the debtor. This is evident from sub-section (2) of Section 9. Section 9 (2) speaks of a counter claim arising in the proceedings which has resulted in a decree or order. Counter claim or set off can arise only in a contractual or mutual dealings between the debtor and the creditor. Section 9 (5) mentions about the decree or order becoming not executable in view of any provisions of Debt Relief Act, which Act can only relieve against the onerous contractual obligations of a debtor. A further reading of the provisions of the Insolvency Act shows that it contemplates the proof of debts. Order X in Insolvency Rules, 1958 mentions about proof of debts. The proof of debts shall be in the form of affidavit in Form No.42. In this form Clause (d) provides that the creditor must state the consideration as goods sold and delivered or monies advanced

under Bill of Exchange. A perusal of those clauses shows that the debt contemplated under Insolvency Act is always contractual based on consideration received by a debtor, the decree or order passed is by way of repayment or compensatory in character. Though it is pointed out by the learned Additional Solicitor General that those provisions are applicable after adjudication and that such contingency has not arisen in this case, I am of the view that those provisions cannot be lost sight while considering the validity of the Insolvency Notice. As stated earlier, the order of penalty could never be contractual and the penalty is by way of punishment. Penalty is an impost by a statutory authority as a punishment of a crime or for contravention of a penal enactment. Such penal liability is never contemplated under Insolvency Act. As a matter of fact, it is brought to my notice that after dismissal of the stay petition in C.M.P.No.8587/2000 in C.M.A.No. 914/2000,the petitioning creditor-Enforcement Directorate initiated a crim inal prosecution for nonpayment of penalty and the said proceeding is pending before the Criminal Court. For all these reasons, I hold that Notice issued under Section 9 (2) of the PTI Act is invalid.

19. Now I shall consider whether the order imposing the penalty had become final within the meaning of section 9 (2) of the PTI Act in view of pendency of Civil Miscellaneous Appeal No. 914/20 00. I have already referred to that sub-section (2) of Section 9 states that any decree or order which has not become final; accordingly it contemplates certain circumstances in which the notice under Section 9 (2) will not be maintainable. They are: A decree or order has not become final; A decree or order that had become final, but the execution of which has been stayed; The decree or order had not become final and the execution is also stayed. Admittedly, in the present case, the decree or order had not become final, since only on finding that there are questions of law, the Division Bench has entertained the appeal. No doubt, the stay petition was dismissed at the instance of the applicant. Mr. B. Kumar, learned senior counsel for the applicant, vehemently contended that where a decree or order is appealed from and where the appeal is admitted and entertained by the Appellate Court, i.e., where the appeal is under active consideration, then the very factum of pendency of appeal amounts to the suspension of the finality of the decree or the order. In other words, according to him, where an appeal is pending, it has the only and inevitable effect of suspending the finality of the judgment. For the said proposition, he very much relied on a judgment of K. Subba Rao (as he then was) of the Andhra Pradesh High Court in Srungaram Appanna v. Kadagala Venkanna, reported in 1954 (2) M.L.J. 156. The learned Judge has held that "it is a well-settled principle of law that an appeal is a continuation of the suit and that when the appeal is filed, the finality of the decree is suspended." He also held that "the rights of the parties thereafter have to be regulated on the basis that the entire proceedings are open, subject no doubt to the well-known procedural limitations."

20. Mr. B. Kumar, learned senior counsel also submits that the expression "the decree or order which has become final and the execution whereof has not been stayed" will include a situation where even though a decree or order has not been formerly stayed by any court or other authority, it is not possible

to execute the same. In support of the above proposition, he relied on a decision of the Bombay High Court in Vijay Jethalal Sh ah v. Laja Nandlal, reported in A.I.R. 1980 Bombay 76. In that case, the decree had become final. But the decree holder had died. In such a situation, the learned Judge (Mrs. Sujata V. Manohar,J-as she then was) held that unless the heirs of the decree-holder obtained a succession certificate under Section 2 (1) (4) of the Indian Succession Act, the decree cannot be executed. It is clear that even though there was no formal order of stay, the Bombay High Court held that such a decree must be considered as stay and it cannot be a basis for issuance of notice under Section 9 (2) of the PTI Act. Similar view has been expressed by a Division Bench of the Bombay High Court in State Bank of India v. Sohanlal Babulal Jain (A.I.R.1997 Bombay 34). Mr. V.T. Gopalan, learned Additional Solicitor General, has referred to a decision of the Supreme Court in V.M. Shah v. State of Maharashtra, reported in (1995) 5 Supreme Court Cases 767 wherein it was held that mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets nor the decree becomes inoperative. No doubt, the said decision supports the stand taken by the Revenue. However, the crucial point is whether in the light of pendency of the appeal, the insolvency proceedings initiated by the department against the debtor is maintainable? is the question in issue. As observed in the Supreme Court decision, the amount can be recovered in the manner provided therein and does not include, initiate extra-ordinary status like insolvency proceedings. Mr. V.T. Gopalan, learned Additional Solicitor General has also heavily relied on a Division Bench of this Court in Pravin Kumar v. Sivagnanam, reported in 1988 (2) M.L.J. 43 wherein the Division Bench, in the light of limited interim stay of dispossession pending disposal of the appeal, has held that the liability to pay mesne profits, which is in the nature of a money decree can be executed without any impediment whatsoever. Further, the same has been admitted by both sides before the Division Bench. In the special circumstance of the case, I am of the view that the same is not helpful to the stand of the Department.

21. It is useful to refer Section 70 of the Foreign Exchange Regulation Act, 1973 which speaks about recovery of sums due to the Government.

"Section 70. Recovery of sums due to Government.- (1) Where any penalty imposed on any person under this Act is not paid,-
(i) the adjudicating officer may deduct the amount so payable from any money owing to such person which may be under the control of any officer of Enforcement; or

(ii) the adjudicating officer may recover the amount so payable by detaining or selling any goods belonging to such person which are under the control of any officer of Enforcement; or

(iii) if the amount cannot be recovered from such person in the manner provided in Cl.(i) or Cl.(ii), the adjudicating officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector on receipt of such

certificate shall proceed to recover from the said person the amount specified thereunder as if it were an arrear of land revenue.

(2) Where the terms of any bond or other instrument executed under this Act or any rule made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.

(3) The several modes of recovery specified in this section shall not affect in any way,-
(i) any other law for the time being in force relating to the recovery of debts due to the Government; or
(ii) the right of the Government to institute a suit for the recovery of the penalty due to the Government,
and it shall be lawful for the Central Government to have recourse to any such law or suit notwithstanding that the amount is to be recovered by any mode specified in this section."

Among these clauses, it is relevant to refer sub-section (3) of Section 70 which shows that apart from the several modes of recovery specified in sub-section (1), it shall not affect in any way the right of the Government to institute a suit for the recovery of the penalty due to the Government. This is evident from Clause (ii) of subsection (2) of Section 70 of the Foreign Exchange Regulation Act. In other words, as per Section 70 (3) (ii), the Central Government can file a suit in the Civil Court and obtain a decree on the basis of the order. In the light of the language used in the above provision, in the absence of any such decree and in view of Section 9 (2) of the PTI Act, the impugned Insolvency Notice is not sustainable.

22. Mr. B. Kumar, learned senior counsel for the applicant, after pointing out Explanation 8 to Section 11, C.P.C., has contended that where a decree or order has been appealed from and if the appeal is pending, the decree or order cannot be said to have become final and hence such decree or order which has been appealed against cannot operate as resjudicata, for which he relied on a decision in S.P.A. Annamalay Chetty v. B.A. Thornhill (AIR 1931 Privy Council 26 3). The Privy Council has observed that, (at page 264)

"The appellant maintained that, under this provision, no decree, from which an appeal lies and has in fact been taken is final between the parties so as to form res judicata, while the respondent contended that such a decree was final between the parties and formed res adjudicata until it was set aside on appeal. In their Lordships' opinion the former view is the correct one, and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res adjudicata as between the same parties?"

The very same judgment has been referred to and approved in the context of considering a question in the Insolvency Act in Venkata Reddy v. Pethi Reddy

(AIR 1963 Supreme Court 992). The following observations are relevant: (para 6)

"6?..Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision, or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable?."

It is also relevant to refer the following observation of the Supreme Court in 1965 S.C. 1585:

"An appeal is a continuation of the proceedings to effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power."

The analysis of all the factual and legal aspects would show that the pre-condition for issuance of notice is not satisfied in this case because the order of penalty of the FERA Appellate Board has not become final and the appeal against the said order is pending before this Court in C.M.A.No. 914/2000.

23. Now I shall consider whether Section 9 (2) of PTI Act contemplates only a decree based on a contract or transactions involving mutuality? Though the definition of the word "debt" under the Insolvency Act is an inclusive definition, it is well settled that a definition takes its colour in the context of the Act and the surrounding features of the Act in which it is used. Elaborate procedures have been prescribed in the Insolvency Act and the Rules for proof of debt-vide Section 13 (2) (a), Sections 46, 48 and Order X of the Rules and Form 42. Though it is argued that all those aspects have to be considered only at the time of passing final order in the insolvency proceedings, I am of the view that the petitioning creditor should satisfy those conditions and specific averments must be made in the insolvency notice. The said provisions referred to above lead to a conclusion that it is only a contractual debt and that too where a consideration is passed from creditor to the debtor alone is contemplated as debt within the meaning of the Act. I have already discussed that "penalty" under a penal enactment always has an underlying premise of punishment. Under Section 9 (2) what is claimed as a debt for the recovery of which a decree or order is passed must be based on mutual dealings between the parties, such that there would be a possibility of a counter claim by the debtor or a moratorium under any debt relief

legislation. Though elaborate argument has been advanced by the learned Additional Solicitor General by sighting decisions arise under Wealth Tax Act and Income-tax Act, as rightly contended by the learned senior counsel for the applicant, the definitions contained in another enactment which is not a cognate enactment should not be used to construe the definition in an enactment. In this regard, learned senior counsel for the applicant has very much relied on the following observation of the Supreme Court in State of Kerala v. Mathai Verghese, reported in AIR 1987 Supreme Court 33: (para 3 page 38)

"3?..The High Court also fell in error in being influenced by the definition of currency notes embodied in the Indian Paper Currency Act (Act XX of 1822). The High Court has overlooked the obvious fact that the definition contained in Sec.2 of the said Act is only for the purposes of that particular Act and it cannot be imported into Sections 489A to 489E of the Indian Penal Code, as has been done by the High Court."

It is clear that unless a definition of an another Act is incorporated by a specific reference, it is wrong to interpret words in a statute in accordance with the definition of another statute, more particularly, when such statute is not dealing with any cognate subject. Likewise in M/s MSCO. Pvt. Ltd., v. Union of India, reported in AIR 1985 Supreme Court 76, the Supreme Court has held that the definition of "industry" in the Industrial Disputes Act cannot be used to interpret the same expression used under the Customs Act. In the line of the decision of the Supreme Court, the judgements referred to on behalf of the Enforcement Directorate are not helpful to their stand. As rightly argued by the applicant, it is not understandable how a person could be adjudicated as a insolvent without the Court first finding that there was a debt and the act of insolvency has been committed. I am of the view that sequence of Sections from 10 onwards have to be followed in every case where a petition is filed by a creditor seeking adjudication of a debtor as an insolvent. It is also relevant to refer a decision of Janardhanam, J. in T.J. Raju v. P.R. Neelakantan, reported in A.I.R. 1991 Madras 24. After referring to various provisions from the Insolvency Act and the Rules, the learned Judge has concluded that, (para 2)

"2?..The combined effect of the provisions extracted above is that an insolvency petition either by a creditor or a debtor cannot at all be filed in Court if the debtor has not ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court, within a year before the date of presentation of the insolvency petition. As adverted to earlier, the insolvency notice being a step in aid for the institution of the insolvency petition cannot at all serve any purpose, in the sense of the same remaining as a paper tiger, if the petitioning creditor was handicapped in not filing the insolvency petition by virtue of the debtor residing beyond the limits of the ordinary original civil jurisdiction of the Court within a year before the presentation of the insolvency petition. To avoid such a predicament position of law, a harmonious construction and interpretation of the provision of Sections 9 to 1 1 of the Act is called for and in that process, it can legitimately be stated that the lack of territorial

jurisdiction would have also to be construed as a ground for setting aside the insolvency notice, though such a ground is not specifically ingrained in Section 9 (5) of the Act. In this view of the matter, the insolvency notice issued in the instant case deserves to be set aside."

I am in respectful agreement with the view expressed by the learned Judge. For all these reasons, I hold that the "penalty" can never be a "debt" within the meaning of Insolvency Act and the impugned insolvency notice is liable to be set aside.

24. The next question to be considered is whether FERA is a complete Code and, therefore, the provisions of Insolvency Act cannot be invoked. I have already referred to Section 70 of the FERA and as per the said provision, any penalty imposed under the Act could be recovered as if it is arrears of land revenue by the Collector. Sub-section (3) of Section 70 of FERA makes the position clear that several means of recovery specified in such section shall not affect, in any way, namely (i) any other law for the time being in force relating to recovery of a debt due to the Government and (ii) the right of the Government to institute a suit for the recovery of the penalty due to the Government. Both the said clauses of sub-section (3) of Section 70, particularly clause (ii) postulates that the penalty is a debt due to the Government and that it can also be recovered as a debt due to the Government and the same can also be recovered as a debt due to the Government in the manner provided therein. By pointing out the above provisions, it is contended on the side of the department that so long as the order of the Appellate Board imposing penalty of Rs.28 Crores has not been set aside, the respondent debtor is liable in law to pay the said amount to the Government and upon whose failure, the Government may take any steps including the filing of the petition under Section 9 (2) of the PTI Act. I am unable to accept the said contention in the light of clauses (i) and (ii) to subsection (3) of Section 70 of the FERA. I am of the view that Section 70 (3) (i) of FERA cannot apply to filing of a petition to declare the debtor as an insolvent, as Insolvent Act has not designed for recovery of money. In other words, Insolvency Court is not a mere execution Court. On the other hand, the provisions of the FERA clearly show that it is a complete code by itself. As per Section 70 (1) (i), the adjudicating authority may deduct the amount imposed by way of penalty out of the money the department may have with them. He should also recover the amount by selling or detaining the goods already seized by them or under their control. If the amount could not be recovered in the above said two modes, then the Adjudicating Officer could prepare a certificate and send it to the District Collector to be recovered as if it is an arrear of land revenue. Though it shall be lawful for the Central Government to have a recourse to any such law, it is clear that the law for the time being in force relating to recovery of dues to Government could be resorted but Insolvency law cannot be resorted to as method of recovering dues from a debtor. As already stated, this is because Insolvency law is not a law for recovery of debt at all. The object of Insolvency law is two fold, namely, to secure the equitable distribution of the properties owned by the debtor amongst his creditors and to afford a maximum safeguard to the debtor against continuous harassment or multiplicity of proceedings against him. To put it clear that the object of an insolvency proceedings could never or ever

be recovery simplicitor. In this regard, it is useful to refer a decision of the Constitution Bench of the Supreme Court in Malludora v. Seetharathnam, reported in AIR 1966 S.C.918 wherein Their Lordships have held that the object of law of insolvency is to seize of the properties of the insolvent before he squanders it and to distribute it amongst its creditors. In Sarat Chandra v. Harak Chand, reported in A.I.R 1972 Supreme Court 2127, it was held that "nonpayment of a decree promptly by itself is no ground to adjudicating a person insolvent; for, insolvency proceedings cannot be an alternative to execution proceedings." The object of the law of bankruptcy in the words of Mulla on The Law of Insolvency in India-1997-4th edition at page 1 is as follows:

"The chief aim of every system of Bankrupt Law should be to combine and regulate two great objects. First the distribution of the effects of the debtor in the most expeditious, the most equal and the most economical mode and secondly, the liberation of his person from the demands of his creditors when he has made a full surrender of his property."

In such a circumstance, though Section 70 (3) (i) of FERA contains a reference, namely, "any other law for the time being in force relating to the recovery of debts to the Government, it cannot mean or refer to insolvency proceedings to adjudge the person from whom any money is due to the Government as an insolvent, further Insolvency Act is not a law relating to recovery of dues due to the Government. In the light of the elaborate procedure prescribed in the FERA, which being a complete Code, the impugned Notice under Section 9 (2) of PTI Act not being a method of recovery of penalty, I am of the view that the impugned Insolvency Notice cannot be sustained in law.

25. The next question to be considered is whether the applicant can raise any other defence than those provided under Section 9 (5) of the Act. I have already referred to the decisions in 1991 Madras 24; 1980 Bombay 76; and 1997 Bombay 34 (all cited supra) wherein it was held that the defence to a petition under Section 9 (2) is not merely just provided under Section 9 (5). Learned Additional Solicitor General, by drawing my attention to sub-section (5) of Section 9 of PTI Act, would contend that the grounds of defence specified under sub-section (5) is exhaustive and no other ground of defence is permissible to a debtor to set aside the insolvency notice issued under Section 9 (2). He further contended that a well known principle namely whatever is not specifically permitted is deemed to be prohibited will also come into play to exclude any other defence than those already mentioned in Section 9 (5). It is also stated that the stage cannot be reached to apply Section 13 (4) (b). It is also stated that even construing that section 13 (4) (b) can be invoked or read into Section 9 (5), on the facts of the case, there is no sufficient cause to escape on account of respondent's own showing. Here again, I am unable to accept the said contention. When the petitioning creditor comes before the Court and seeks an order of adjudication that a person be declared as an insolvent, he must establish that (1) he is a creditor of the debtor; (2) there is a debt; (3) he must adduce proof of the debt within the meaning of PTI Act; and (3) he must allege one of the acts of insolvency provided for under the Act. After all these are proved, then only the respondent need be called upon to answer. It is settled law that every

Court has the jurisdiction and a duty to find out if a petition discloses jurisdictional facts which will enable the Court to exercise the jurisdiction in the first place. If such jurisdictional facts are not established or averred, there is no question of calling upon the respondent to answer them at all and for non-establishing those jurisdictional facts, the petition must be set aside. In this regard, the Court has to find out whether the decree or order has become final; whether the execution of which is stayed; if the petitioning creditor is entitled to execute the decree or order. Further, if the Notice under Section 9 (2) is not under the prescribed form and not served in the manner prescribed under the Act, then the petition must fail. In such circumstances, a decision that any one of the above aspects could be reached even without looking into the petition filed under Section 9 (5) of the Act. This leads to a conclusion that some other circumstances also to be looked into. In Malludora v. P. Seetharathnam, (AIR 1966 Supreme Court 918), the Supreme Court has observed thus: (para 7)

"7??In addition, the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the Section need not necessarily be read ejusdem generis with the previous ones but even so there can be no sufficient cause if, after an act of insolvency is established, the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances. What those cases would be, it is neither easy nor necessary to specify, but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him or where the petitioning creditor having refused tender of money, fraudulently and maliciously files the application. An order is sometimes not made when by the receiving order the only asset of the debtor would be destroyed such as a life interest which would cease on his bankruptcy. Cases have also occurred where a receiving order was not made because there were no assets and it would have been a waste of time and money to make a receiving order against the debtor??"

It is clear that the petition filed by the petitioning creditor can be dismissed even for reasons that are not mentioned under Section 9 (5) of the PTI Act.

26. The other question to be considered is whether Enforcement Directorate is an independent entity and whether the proceedings initiated by the Deputy Director cannot be said to be by the Government of India. Mr. B. Kumar, learned senior counsel for the applicant by relying on Section 70 of FERA, more particularly sub-section (3) of Section 70, would contend that inasmuch as on imposition of penalty in the adjudication proceedings it becomes sum due to the Central Government, the insolvency proceedings initiated by the Deputy Director cannot be said to be by the Government of India. In other words, according to him, if sums are due to the Central Government, then Central Government alone could be a petitioning creditor and no one else. It is also his contention that it is the Union of India who should be the petitioning creditor and it must be represented by a person duly authorised. In support of his contention, he very much relied on a decision of G. Ramanujam, J., in

Director of Enforcement, Madras v. Rama Arangannal, reported in A.I.R. 1981 Madras 80. In this decision, the learned Judge has dealt with an appeal filed by the Director of Enforcement under Section 54 of the Foreign Exchange Regulation Act (FERA) 1973 against the order of Foreign Exchange Regulation Appellate Board. After considering the Explanation to Section 54 of the FERA and in the absence of any material to show that the Central Government actually decided to appeal against the order of the Appellate Board and instructed the Director of Enforcement to file the appeal on their behalf, held that the appeal filed by the Director of Enforcement against the order of the Appellate Board cannot be maintained. It is true that as per the said decision, the insolvency notice filed by the Deputy Director on behalf of the Enforcement Directorate cannot be maintained. However, Mr. V.T. Gopalan, learned Additional Solicitor General, has very much relied on a Division Bench decision of this Court in Central Board of Film Certification v. Yadavalaya and another, reported in 1994 Writ. L.R. 835. The first question raised before the Division Bench was regarding the maintainability of the writ petition filed by the Central Board of Film Certification ( Ministry of Information and Broadcasting, Government of India). The writ petition was filed challenging the validity of the order of the Film Certification Appellate Tribunal which had, while allowing the appeal before it against the order of the Revising Committee refusing certificate, directed the issue of an "A" certificate for the Tamil film " Kutrapathirikkai" subject to carrying out of certain cuts/deductions listed by it. The preliminary objection was raised on behalf of the first respondent/producer of the film for the maintainability of the writ petition by contending that the petitioner-Board and the Appellate Tribunal, the second respondent therein, are parts of a composite body and that the Acts provides for three remedies. It was stated that the Board cannot arrogate to itself and question by way of a writ, in a Court of Law, the verdict of a superior authority. The Division Bench, after referring to a decision in Bar Council of Maharashtra v. M.V. Dabholkar (A.I.R. 1975 S.C. 2092) and section 5-D (11) of the Cinematograph Act, has concluded that the Censor Board is a party to the lis and so, logically it would be a person aggrieved. They further held, (para 37)

"37?..We have already noticed that the first respondent's counsel has taken serious objection to the stand of the petitioner, that the Union Government, had authorised, preferring of this writ petition and to our minds, it will be totally unnecessary to get into this controversy, for we have already definitely concluded, that the petitioner will certainly be a "person aggrieved" and that in any event, once it had chosen to bring to the notice of this Court the serious legal infirmities apparent in the order of the Tribunal, then this Court would be justified in suo motu scrutinising the validity or otherwise of the impugned order on the entire material made available for consideration. Our aforestated conclusion will put an end to the preliminary objection and how we have embark upon the inherent merits of the order passed by the Tribunal and sans the hurdle of maintainability, which now stands cleared."

It is clear from the said Division Bench decision that the writ petition filed by the Central Board of Film Certification against the order of the Appellate

Tribunal is the person aggrieved and the writ petition is maintainable. At this stage, it is also relevant to note that Mr. V.T. Gopalan has brought to my notice a communication from the Directorate of Enforcement, Government of India, wherein it is stated that "the Director of Enforcement is an Ex-Officio Additional Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi." It is clear from the said communication that the Director of Enforcement is an Officer in the Ministry of Finance and Department of Revenue, Government of India. In Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, reported in (2002) 5 Supreme Court Cases 111, Their Lordships of the Supreme Court has explained the "ex officio appointment". In para 50 it is stated that,

"50??An ex officio appointment means that the appointment is by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer, in this case the Prime Minister, which are not specifically conferred upon him, but are necessarily implied in his office (as Prime Minister), these are ex officio."

It is also relevant to note a decision in V.S. Mallimath v. Union of India, reported in (2001) 4 Supreme Court Cases 31 wherein it was held that the expression "Government of India" includes all officers functioning under three wings namely the Legislature, the Judiciary and the Executive. All the above particulars show that the Deputy Director, Enforcement Directorate is an officer in the Government of India coming under the Ministry of Finance, Department of Revenue and is not independent of the Government of India. He is an officer of the Union and his acts and duties are only official and he is acting for the Government of India. The question is that whether penalty which is sought to be recovered by the Deputy Director for invoking the provisions of the Insolvency Act is different, for which I have already expressed my conclusion. Accordingly, I hold that the initiative by the Deputy Director on behalf of the Enforcement Directorate is maintainable.

27. To sum up, as stated earlier, the insolvency proceedings have to be construed with greatest strictness in favour of the debtor. The Courts have emphasised the need for such strict view. Hallsbury's Laws of England relating to bankruptcy in para 255 it is precisely observed that "the words of the enactment creating act of insolvency are construed and applied in their strict technical sense." The said view is reiterated by various High Courts as well as the Hon'ble Supreme Court. The term "petitioning creditor" has to be construed with strictness. The Directorate has already initiated for recovery of the amount as per the provisions of Section 70 (1) (iii) of FERA by issuing a certificate to the Collector for recovery of the money as if it is an arrear of land revenue. Since they have already elected to pursue a remedy under the law, the present application filed under Section 9 (2) would constitute an abuse of law and a wanton exercise of power. In this regard, it is also relevant to note that the applicant is an elected Member of Parliament. It is the contention of the learned counsel for the applicant that the object of this petition appears to be to disgrace and humiliate him and also defeating the will of the people by securing a disqualification. In the light of my discussion, the said contention and the apprehension of the applicant cannot

be lightly rejected. Further, the petitioning creditor had not even sought the distribution of any assets of the applicant. I have already referred to the well known principle that the object of the insolvency proceedings is not recovery of money.

28. I answer the questions considered for discussion. The Insolvency Notice certified by the Master is in order and he is well within his jurisdiction to issue such Notice. The Insolvency Notice is in a prescribed form and served in a prescribed manner in accordance with the Insolvency Rules. The order imposing penalty has not become final in view of pendency of C.M.A.No.914/2000 before this Court having been admitted by the Division Bench. The order which is imposing "penalty" for contravention of a penal statute cannot amount to a debt within the meaning of the P.T.I.Act, nor the applicant be characterised as a debtor within the meaning of the said Act. The debt under the PTI Act is contractual requiring mutual dealings between the creditor and the debtor and passing of consideration from the creditor to debtor. The term "execution has not been stayed" could only mean an execution which is possible in a Civil Court under Code of Civil Procedure. The order as such not being capable of execution in a Civil Court under Code of Civil Procedure, it must be taken as that it is not capable of execution as it stands to day. The petition filed by the Deputy Director, Office of the Enforcement Directorate is maintainable. The FERA is a complete Code since it has provided a method of realisation of penalty imposed. Where the Central Government institute a suit and gets a decree on the basis of the penalty imposed in terms of Section 70 (3) (ii) of FERA, on the basis of such decree, the insolvency proceedings under Section 9 (2) can be resorted to. The impugned insolvency notice filed by the Enforcement Directorate is an ulterior motive to humiliate and disgrace the applicant and the recourse adopted by them is not a bona fide realisation of debt and, therefore, the insolvency notice is liable to be set aside.

29. Under these circumstances, the Insolvency Notice No.39 of 2001, issued under Section 9 (2) of the P.T.I.Act is set aside; consequently Application No. 177 of 2001 filed by the applicant is allowed. No costs.

Index: Yes
Internet: Yes

P. SATHASIVAM, J

Order
in Application No.177/2001
in
Insolvency Notice No.39/2001